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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

MAXWELL S. COBB,

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

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27pp

QUESTION PRESENTED

Where the Defendant received his Miranda warnings at his arrest approximately four months before trial, will Jenkins vs. Anderson allow the prosecution to cross-examine the Defendant regarding his pre-trial silence without distinquishing between pre-arrest and post-arrest silence.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on December 28, 1984, rehearing denied on February 5, 1985.

CITATIONS TO OPINION BELOW

On December 28, 1984, the Eleventh Circuit Court of Appeals affirmed without opinion. Petition For Rehearing was denied on February 5, 1985. These orders of the court are found in Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1984, rehearing denied on February 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The Defendant was arrested by agents of the Federal Bureau of Investigation on December 1, 1983, and charged with conspiracy to manufacture and distribute methamphetamine, distribution of methamphetamine, and three counts of use of a communication facility to facilitate that alleged conspiracy. At the time of his arrest, he was repeatedly given the "Miranda" warnings. Indeed, approximately one month preceding that arrest, he had been arrested by government agents in another case relating to alleged environmental violations. (He has since been acquitted of all charges in that other case, Case Number 83-170-Cr-J-16, Middle District of Florida). At the time of his earlier arrest, he was also advised of his "Miranda" rights. In exercise of these rights, he made no

statement to law enforcement authorities prior to trial.

At trial, he interposed the defense of entrapment.

The testimony showed that the Defendant was president and principal stockholder of the American Electric Company, whose primary business was in transformer maintenance including the transportation, removal, and disposal of P.C.B., a carcinogenic agent often found in transformer oil. The government's proof showed that a paid informant, Adrian Briscoe, who knew the Defendant from other business dealings, introduced F.B.I. Agent Donald Weathermon to the Defendant on March 11, 1983. The informant, Briscoe, had set up the meeting ostensibly to discuss a proposed transformer salvage operation on land allegedly owned by Agent Weathermon in the Atlanta area.

However, during this initial meeting on March 11, Briscoe advised the Defendant that Agent Weathermon was also interested in being involved in the manufacture or distribution of amphetamine. Briscoe advised Weathermon that the Defendant could be a source for that controlled substance. And, as part of the discussion, Briscoe asked the Defendant to produce a sample of the substance.

In response to this request, the Defendant made a telephone call to an individual now identified as Jerry Pendergrass. Approximately one hour later, Pendergrass met the Defendant, Weathermon, and Briscoe in the parking lot of a lounge. He delivered approximately one gram of a gray powder which later proved to be methamphetamine.

This initial meeting was followed by a series of telephone calls and meetings,

all but one of which were initiated by Agent Weathermon or Agent Driver of the Drug Enforcement Administration who later became involved. Despite repeated requests by the government agents, the Defendant never produced another sample or other quantity of the methamphetamine. There was, however, a continuing series of conversations regarding various plans for the production of the methamphetamine. In these conversations, the Defendant excused his failure to produce the drug because of his inability to secure P2P, a precursor ingredient necessary to the production of methamphetamine. Ultimately, the Drug Enforcement agent (Driver) offered to bring in his own chemist to meet with the Defendant's "chemist" in order to teach him how to produce the missing ingredient. Driver also provided the Defendant with a list of ingredients

needed to make the P2P. Thereafter, Agent Driver initiated one more meeting with the Defendant wherein the Defendant allegedly advised that his "chemist" would not agree to meet with Driver's chemist as Driver had suggested. That was the last communication or meeting involved in the alleged conspiracy.

During all of these conversations, there were contemporaneous conversations between the Defendant and the government agents regarding his ongoing desire to establish a transformer salvage business as discussed in the original meeting.

Cobb testified in his own defense that in early 1983 he was looking for a site to establish a transformer salvage operation. Also during that time, the financial condition of his business was extremely tenuous. According to the Defendant, this latter fact was well known to the Government informant.

The gist of his testimony was that he met with the government agents because of his interest in establishing a transformer salvage operation. When the government agents initiated discussion of drugs during this meeting, the Defendant went along with their request in order to maintain the rapport necessary to close the proposed transformer salvage deal. Through his acquaintance with the unindicted co-conspirator Pendergrass, he was able to secure the small sample originally delivered on March 11. After that first day's meeting, the Defendant described a series of calls where the government informant Briscoe continued to encourage him to go along with the discussions relating to drugs as part of the effort to close the salvage deal. According to the Defendant, he played along with these later discussions

without any real interest in actually participating in the illegal enterprise.

There was never any suggestion that he was coerced or threatened in anyway to insure his participation. Rather, his testimony established that to the extent that he was involved, participation was the product of governmental inducement or persuasion.

On cross-examination, the following occurred:

> "Q Now Mr. Cobb, the first time that you have in fact informed the F.B.I., because of its presence in the courtroom, or any other law enforcement person, about the existence of Mr. Pendergrass [unindicted co-conspirator] yourself, is in fact, today; isn't that right?
>
> A That's true.
>
> Q And this is the first occasion, in fact, that you have given this particular detailed story to law enforcement authorities is today in this courtroom?"

Following these questions and answer, the Defendant moved for mistrial. This motion was denied.

During closing arguments, the prosecutor argued in pertinent part:

> "And I ask you in that context, are you going to believe the way this was originally stated on the tape recordings, or are you going to believe a more favorable version made up by Cobb after he has heard all of the evidence and the way it's presented against him".

Following these remarks, the Defendant again moved for mistrial. That motion was denied.

The Defendant was thereafter convicted of all counts and sentenced to a cumulative total of five years imprisonment.

On December 28, 1984, the Eleventh Circuit Court of Appeals affirmed without opinion. Petition For Rehearing was denied on February 5, 1985.

REASONS FOR GRANTING THE PETITION

The Defendant had been advised of his "Miranda" warnings at the time of his arrest on these charges and approximately one month before that when arrested on other charges. In reliance upon those warnings, he made no statement prior to trial. On cross-examination, he was asked:

> "Q Now Mr. Cobb, the first time that you have in fact informed the F.B.I., because of its presence in the courtroom, or any other law enforcement person, about the existence of Mr. Pendergrass yourself, is in fact, today; isn't that right?
>
> A That's true.
>
> Q And this is the first occasion, in fact, that you have given this particular detailed story to law enforcement authorities is today in this courtroom?"

There was no attempt to delineate or in anyway circumscribe the timeframe

referred to by the prosecutor's questions. These questions were so broad as to contemplate not only the Defendant's post-arrest pre-trial silence, but his silence up to and including any moment before the third day of his own trial. There was no qualification or limitation in the framing of the question. Such cross-examination has been uniformly condemned as being far more prejudicial than probative, United States vs. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), and, as a deprivation of due process, Doyle vs. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

As a general proposition of law, it is clear that it is reversible error for there to be any cross-examination or comment regarding the defendant's silence following arrest and a "Miranda" warning such as occurred in the case at bar.

Indeed, it could well be argued that the continuing vitality of United States vs. Hale prohibits comment even in the absence of such "Miranda" warnings. But against this broad rule of prohibition, this Court has created what would appear to be a very narrow exception to the general rule regarding any comment on the defendant's pre-trial silence. In Jenkins vs. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) this Court approved such comment or questioning when related to the defendant's pre-arrest silence. This Court there found a substantial distinction between pre-arrest silence and the silence of a defendant who has been assured by governmental authorities that he has the right to remain silent, the right to counsel before speaking, and the implicit assurance that such silence (as opposed

to his statements) will not be used against him. In that case, the cross-examination very pointedly focused on the defendant's conduct immediately after his involvement in a homicide which he claimed at trial was committed in self-defense. In contrast to Doyle vs. Ohio, supra, the court there found no due process violation because of the use of such pre-arrest silence. Interestingly, the court specifically limited its ruling to the due process issue while leaving each jurisdiction free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial. Undersigned counsel has found no case where this Court had decided whether the federal evidentiary rule announced in United States vs. Hale, supra, would extend to pre-arrest silence.

More appropriate to the facts in the case at bar is the concern that the exception created by the Jenkins vs. Anderson will devour the general rule prohibiting comment on pre-arrest silence. In the case at bar, the trial court responded to the Defendant's Motion For Mistrial by analogy to Eleventh Circuit authority, United States vs. Riola, 694 F.2d 670 (11th Cir. 1983), which approved the prosecutor's cross-examination of a defendant involving questions very similar to those in the case at bar. Riola, approved such cross-examination upon a finding that the defendant's coercion defense would necessarily leave the jury to conclude that the questions, considered in context, were directed to the defendant's failure to notify authorities before her arrest. There is logical appeal to this finding given the defendant's testimony

there that she was forced through threats of violence to participate in the distribution of cocaine. The trial court in the case at bar regrettably misread Riola to involve the defense of entrapment rather than coercion. From that erroneous premise, the trial court here found that it was a "fair question" of why didn't the Defendant "go to the authorities with this story?" The trial court therefore found that the jury would naturally take such questions as referring to the Defendant's pre-arrest silence. By its per curiam affirmance, the Eleventh Circuit has impliedly approved this analysis.

Only a clear and unequivocal statement by this Court will prevent such encroachment on the Defendant's right to maintain his pre-trial silence. It borders on sophistry to construe the questions at issue here (and the comment

in closing argument) as being other than a totally uncircumscribed inquiry as to why the Defendant remained silent up through and including the first three days of his trial.

By its previous decisions reviewed herein, this Court has made distinctions designed to serve the truth-finding process without doing violence to the defendant's legitimate due process guarantees. The case at bar offers the Court an opportunity to prevent further distortion of those distinctions that it so carefully drew.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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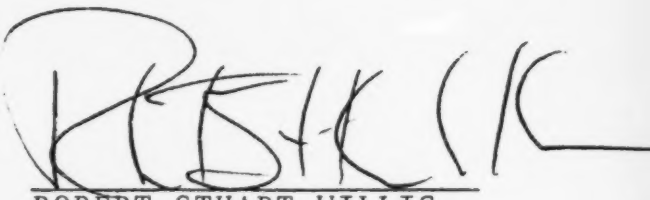
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Solicitor General, and to Robert W. Merkle, United States Attorney, by U. S. Mail, this 29th day of March, 1985.



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A P P E N D I X

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3314
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAXWELL S. COBB,

Defendant-Appellant.

Appeal from the United States
District Court for the
Middle District of Florida

(December 28, 1984)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3314

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAXWELL S. COBB,

Defendant-Appellant.

Appeal from the United States
District Court for the
Middle District of Florida

ON PETITION FOR REHEARING

(February 5, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch

United States Circuit Judge